No. 12,884

IN THE

United States Court of Appeals

For the Ninth Circuit

CENTRAL FRUIT & VEGETABLE CO., and WEST TEXAS PRODUCE COMPANY,
Appellants,

vs.

ASSOCIATED FRUIT DISTRIBUTORS OF CALIFORNIA, RAYMOND M. CRANE, RED LION PACKING COMPANY and JOHN C. KAZANJIAN,
Appellees.

BRIEF OF APPELLEE JOHN C. KAZANJIAN, DOING BUSINESS AS RED LION PACKING COMPANY.

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JURISDICTIONAL STATEMENT.

This action originated before the Secretary of Agriculture under the provisions of the Perishable Agricultural Commodities Act (7 U.S.C.A. 499), when appellants, Central Fruit & Vegetable Co. (hereinafter referred to as "Central Fruit"), and West Texas Produce Company (hereinafter referred to as "West Texas Produce"), filed a complaint against appellees, Raymond W. Crane, doing business as

Associated Fruit Distributors of California (hereinafter referred to as "Crane"), and John C. Kazanjian, doing business as Red Lion Packing Company (hereinafter referred to as "Kazanjian"). The Secretary of Agriculture is given jurisdiction to determine the matters presented to him by the provisions of 7 U.S.C.A., Section 499(f) and (g).

Appellees filed answers to the complaint and a formal hearing was had in Los Angeles, California, before an examiner appointed by the Secretary of Agriculture.

The report of the examiner who presided at the formal hearing dismissed the complaint as to Kazanjian but awarded damages against Crane. However, after the hearing the Secretary of Agriculture made an award in favor of Central Fruit against Kazanjian in the amount of $6,133.26 and in favor of West Texas Produce against Kazanjian in the sum of $10,112.16, together with interest (Tr. p. 63), and dismissed the complaint against Crane.

Kazanjian appealed to the United States District Court for the Southern District of California. The jurisdiction of the United States District Court to hear and determine the appeal from the order of the Secretary of Agriculture is based upon the provisions of law contained in 7 U.S.C.A., Section 499(g). Crane filed an amended answer.

The United States District Court conducted an extended trial *de novo* and made and entered its judg-

ment dismissing the action against both Kazanjian and Crane (Tr. p. 84, et seq.).

Appellants made a motion for a new trial (Tr. p. 88, et seq.), which was denied by the United States District Court (Tr. p. 108).

Appellants Central Fruit and West Texas Produce then filed this appeal to the United States Court of Appeals, which is given jurisdiction to review the judgment of the United States District Court by the provisions of law set forth in Section 128 of the Judicial Code, 28 U.S.C.A., Section 1291.

ARGUMENT.

I. APPELLANTS' ARGUMENT OVERLOOKS ELEMENTARY POINTS OF LAW.

Throughout their opening brief appellants make arguments which ignore elementary rules of law, i.e., the effect of the findings of fact of the Secretary of Agriculture and of the findings of the District Court after the trial *de novo*. To eliminate a reconsideration of these points in answer to each of appellants' contentions, they will be reviewed briefly without reference to any of appellants' particular contentions.

In addition, appellants in their arguments constantly assume facts which have been found by the District Court not to exist. For example, the District Court found that Kazanjian never entered into a binding agreement to sell grapes to appellants. In

spite of this finding which was amply supported by the evidence, appellants assume throughout their brief that such a contract existed. As the major premise upon which their argument is based is false, their argument must fail and the authorities cited in support thereof are in many instances irrelevant to the real issues.

A. APPELLANTS MISCONSTRUE PROVISION IN SECTION 499g (c) OF PERISHABLE AGRICULTURAL COMMODITIES ACT, 7 U.S.C.A. 499g (c), THAT FINDINGS OF FACT OF SECRETARY OF AGRICULTURE SHALL BE PRIMA FACIE EVIDENCE OF FACTS STATED THEREIN.

Section 499g(c) of the Perishable Agricultural Commodities Act, 7 U.S.C.A. 499g(c), provides that on an appeal from a reparation order by the Secretary of Agriculture to the District Court of the United States, such suit in the District Court shall be a trial *de novo* and shall proceed in all respects like other civil suits for damages, except that the findings of fact and order or orders of the Secretary shall be *prima facie* evidence of the facts stated therein. Appellants' opening brief misconstrues the intent and meaning of this provision and overlooks the fact that any *prima facie* effect of the Secretary's findings and orders has been overcome by contradictory evidence which was accepted by the District Court. Even the cases cited by appellants regarding the *prima facie* effect of the Secretary's findings and orders state that the facts found by the Secretary shall stand *only* until sufficient evidence is produced on the trial to overcome them. The trial *de novo* under this section means a

trial anew of the entire controversy, including the hearing of evidence as though no previous action had been taken.

Spano v. Western Fruit Growers, Inc., 83 F. 2d 150 (CCA 10).

B. AFTER A TRIAL DE NOVO IN THE DISTRICT COURT THE FINDINGS OF THE DISTRICT COURT MUST BE SUSTAINED UNLESS CLEARLY ERRONEOUS.

Throughout their brief appellants ignore the evidence before the District Court which was considered by it in making its findings and proceed upon the basis that this Court will overlook entirely the evidence upon which the District Court based its findings and enter findings contrary thereto without a showing that the District Court's findings are clearly erroneous.

Normally, a trial Court's findings on conflicting testimony in open Court will not be disturbed on appeal.

Clements v. Coppin, 61 F. 2d 552 (CCA 9).

As provided in Rule 52 of the Federal Rules of Civil Procedure (28 U.S.C.A.), findings of fact of a trial Court shall not be set aside unless clearly erroneous and due regard shall be given to the opportunity of the trial Court to judge the credibility of the witnesses.

United States v. Fotopulos, 180 F. 2d 631 (CCA 9).

In the present case, extended oral testimony was presented by the parties involved. The trial Court had the opportunity of observing the witnesses and the

demeanor of these witnesses and their sincerity and their candor is a matter for the trial tribunal.

The District Court is not bound by the findings of the Secretary but makes its findings based upon the evidence before it. As was stated in *A. E. Barker & Co. of California v. Gilinski Fruit Company,* 100 F. 2d 863 (CCA 8), on page 864:

> "It was the conclusion of the Secretary of Agriculture upon the evidence before him that the buyer had not found the melons below requirements on inspection admittedly made at the time of tender, and had not given notice of rejection within the time required, but the conclusion of the District Court upon the evidence before it was to the contrary as appears from its carefully considered opinion included in the record. It is earnestly contended here that the District Court was in error, and especially that it failed to accord proper weight to the evidence tending to show that the buyer did not give the required notice of rejection within the twenty-four hour period. But the state of the record here does not permit this court to pass upon the issues of fact in controversy. The trial in the District Court was de novo, as required by the statute (Section 499g(c), and the questions of fact having been submitted upon conflicting evidence to the court sitting without a jury, the general finding of the court was as conclusive as a verdict tendered by a jury. Fleishmann Construction Corp. v. United States, 270 U.S. 349, 46 S. Ct. 284, 70 L. Ed. 624; Central of Georgia Ry. v. West Virginia Pulp and Paper Co., 67 App. D. C. 309, 92 F. 2d 292."

In the present case the District Court properly conducted the trial *de novo* at which extensive oral and written testimony and evidence was received and the findings of the District Court supplant those of the Secretary and are as conclusive as if the Secretary had never made findings.

Ashton v. Sentney, 145 F. 2d 719 (CCA 9);
Larsen v. Portland California S.S. Co., 66 F. 2d 326 (CCA 9);
Gates v. General Casualty Company of America, 120 F. 2d 925 (CCA 9).

The appellants throughout fail to sustain the burden of presenting a proper record which would compel the overthrowing of the findings below because the evidence contained in the record shows a direct conflict which has been determined adversely to the appellants by the District Court.

United States v. Foster, 123 F. 2d 32.

II. CRANE WAS THE AGENT OF APPELLANTS AND NOT OF KAZANJIAN.

Appellants attack the findings of the District Court that Crane was their buying broker and agent (Tr. p. 78, par. VII), but was not the broker or agent of Kazanjian (Tr. pp. 71-72, par. III).

In making this attack appellants again overlook the rule that after a trial *de novo* the findings of fact of the District Court will be sustained unless clearly erroneous (see authorities cited supra). Appellants

rely upon the *prima facie* effect of the Secretary of Agriculture's conclusion, not finding, that Crane was an agent of Kazanjian as well as of appellants. There is no real contention that there was not ample evidence adduced in the District Court to sustain its findings.

Appellants concede that Kazanjian was not to pay Crane any compensation because, as found by the District Court, the market was a seller's market during which Kazanjian could sell his grapes at the ceiling price established under the Federal Emergency Price Control Act without employing or paying a broker or agent (Tr. p. 72, par. III). Appellants' testimony showed that they were to pay Crane $50.00 per car to buy grapes for them.

Joe Moseman, one of the partners of Central Fruit, admitted that he was willing to pay Crane $50.00 per car for purchasing grapes for Central Fruit as well as 3% brokerage to Southwest Brokerage Company (Tr. p. 392, and Tr. p. 418), and that Crane was trying to get some grapes for him (Tr. pp. 395-396). Contrary to the complaint verified by him which stated that Crane acted in behalf of himself and as the agent of Kazanjian, Mr. Moseman admitted that Crane was the agent of appellants when he testified:

> "Q. You of course regarded Mr. Crane, that is, The Associated Fruit Distributors, as acting for you and as your employee in procuring this fruit for you, didn't you?
>
> A. Well, yes.

Q. And he and the Southwest Brokerage Company were both acting for you in trying to procure grapes, were they not?

A. That's right." (Tr. p. 410.)

He stated that he considered Crane to be his agent (Tr. p. 419).

Harry Bockstein, one of the partners of West Texas Produce, admitted that it was to pay Crane $50.00 per car for buying brokerage (Tr. p. 148), on cars bought for West Texas Produce.

Certainly, appellants cannot contend that the District Court's findings that Crane was their agent is unsupported in view of their own testimony. In addition, Crane testified that he was acting as a buying agent for appellants (Tr. pp. 203-204); that his charge of $50.00 per car was intended as compensation for acting as agent for the appellants (Tr. p. 303); and that the only way a broker could exist at that time was to act for the buyer because ceiling prices were set (Tr. p. 307).

It will be recalled that the District Court found that Kazanjian could sell his grapes at the ceiling price without employing or paying a broker or agent (Tr. p. 72, par. III). Obviously, there was ample reason for appellants employing Crane as an agent and absolutely no reason for Kazanjian to do so.

Crane testified that he had no agreement with Kazanjian during the period of ceiling prices for the payment of commissions to him (Tr. p. 239). Had

he been acting as the agent of Kazanjian he would have required compensation.

Kazanjian's testimony clearly shows that Crane was not employed by him and was not acting as his agent. Appellants impliedly concede that Kazanjian's testimony could be accepted by the District Court as supporting its finding that Crane was not Kazanjian's agent so that it need not be quoted in detail.

Kazanjian testified that he did not know what Crane was doing, that was Crane's business (Tr. p. 338); that Crane had no authority, either oral or written, from Kazanjian to make any offer on Kazanjian's behalf (Tr. p. 338); that he had not given Crane any authority to make any definite offers (Tr. p. 338); that Crane was supposed to come to Kazanjian with a proposition and see if it was satisfactory to Kazanjian (Tr. p. 338); that Crane was to make the deal and then come to Kazanjian and find out if the deal was satisfactory to Kazanjian; that he never told Crane what deal to offer (Tr. p. 339); that he never authorized Crane in writing to sell grapes to appellants (Tr. pp. 186-187); that he did not know Crane had sent the September 26, 1944 telegram to appellants (Tr. p. 181); that Crane never told him with whom Crane was dealing or doing business (Tr. pp. 185 and 340); that he had absolutely no control or direction over what Crane did or acted or negotiated (Tr. p. 359); and that there was no agreement on his part in this deal to pay any commission to Crane (Tr. p. 360).

It is clear that the elements necessary to constitute Crane the agent of Kazanjian are missing if the testimony of Kazanjian is accepted. The findings of the District Court show that the Court found that Kazanjian was a credible witness i.e. as defined by Words and Phrases under the topic "Credible Witness", to wit:

> "A credible witness is merely one who is competent and trustworthy and worthy of belief."

See also 15 *Corpus Juris* 1347 for definition.

As pointed out by Rule 52 of the Federal Rules of Civil Procedure (28 U.S.C.A.) and authorities hereinbefore cited, due regard must be given to the opportunity of the trial Court to judge the credibility of witnesses. Here the trial Court adjudged the testimony of witnesses and found more credible those testifying to facts showing that Crane was not an agent of Kazanjian.

Appellants attempt to set forth in their brief certain arguments contrary to the Court's findings but all are based upon the false presumption of an agreement that Crane could speak for Kazanjian. The Court has found that no such agreement existed and appellants have not sustained the burden of showing why the Court's findings should be overthrown.

Appellants cite cases pertaining to the findings of the Secretary of Agriculture and their effects *until* sufficient evidence is produced at the trial to overcome them. As pointed out hereinbefore and in *Spano v. Western Fruit Growers, Inc.*, 83 F. 2d 150, and *A. E.*

Barker & Co. v. Gilinski Fruit Company, 100 F. 2d 863, where the matter is tried *de novo* and the matter is submitted upon conflicting evidence, the findings of the District Court overcome the prima facie effect of the secretary's findings and become as conclusive as a verdict of a jury or a finding of the Court without any findings of the secretary.

Rhode v. Bartholomew, 94 Cal. App. 2d 272, *Vahlsing v. Rothstein,* 107 Pa. Supp. 281, 163 Atl. 350, and 12 *Corpus Juris Secundum* 8, are cited by appellants as authority that a broker may act as agent for either or both parties. Why they are cited is uncertain. Kazanjian did not know of the dealings between Crane and appellants (Tr. pp. 181, 185 and 340); Kazanjian did not carry on any negotiations with appellants or either of them as Crane was neither his agent or intermediary; Kazanjian was not to pay Crane; and Kazanjian never entered into a contract to sell grapes to appellants. The District Court's finding that Crane was not the agent or broker of Kazanjian makes the cases so cited inapplicable.

III. NO BINDING CONTRACT BETWEEN KAZANJIAN AND APPELLANTS EVER EXISTED.

The District Court found that neither Kazanjian nor Crane entered into any written agreement for the sale of grapes to appellants (Tr. p. 79, par. IX); that Kazanjian never authorized Crane in writing to sell grapes for him and that Kazanjian never ratified in writing any proposed sale (Tr. p. 80, par. IX); and

that the parties never at any time agreed upon the terms of a contract of sale of grapes and that there was no meeting of the minds of the parties as to the terms of the proposed sale (Tr. p. 81, par. X).

If these findings are supported by evidence all other points in this case become immaterial. If there was not any meeting of the minds of the parties as to the terms of the proposed sale, there was not any contract and not any basis for a complaint exists. These findings of the Court are so amply supported by oral and documented evidence that no other conclusion could be reached.

As found by the District Court and as pointed out hereinbefore, Kazanjian was not represented by Crane and did not know what Crane was doing or with whom he was dealing. The only written documents or messages which came to or were sent by Kazanjian were Crane's telegrams to him of October 3, 1944, and Kazanjian's answering telegram to Crane of October 4, 1944. These telegrams are the only basis possible for claiming a contract upon the part of Kazanjian. An examination shows that not any contract was entered into by the telegrams but that Crane by his October 3rd telegram made an offer which was rejected by Kazanjian's October 4th wire which in turn submitted new counter proposals which even appellants do not seriously contend were accepted.

Crane's wire of October 3, 1944, from Los Angeles, California, to Kazanjian at Exeter, California, read as follows:

"RED LYON PACKING CO.
EXETER, CALIFORNIA
REFERRING TELEPHONE HAVE SOLD FOR YOUR ACCOUNT BASIS 2.50 LUG NET TO YOU BLOCK EMPERORS MENTIONED FIVE CARS BASIS 750.00 CARE DEPOSIT TEN CARS BASIS 1000.00 DEPOSIT TO BE PAID UPON RECEIPT USONE GOVERNMENT INSPECTIONS NOW DEPENDING YOU HANDLE THROUGH US BALANCE CARS YOU MENTIONED FOR FRESH SHIPMENT ADVISE WHEN EXPECT SHIP THESE BELIEVE WE COULD PLACE THEM NOW CEILING PRICDXXX PRICE WITH DEPOSITS SELLING BASIS ABILITY MAKE USONE GRADE SUGGEST GIVE US APPROXIMATE SHIPPING DATES MAYS WELL GET CLEANEDUP SINCE CEILING PRECLUDES ANY POSSIBILITY HIGHER MARKET TIME OF SHIPMENT WILL FORWARD CONFIRMATION FOR YOUR SIGNATURE SOONS RECEIVED AIRMAIL FROM BUYERS.
ASSOCIATES FRUIT DISTRIBUTORS OF CALIF."

(Tr. p. 453) (Underscoring is by appellee).

Kazanjian rejected the offer in Crane's telegram and made new counter offers in his October 4, 1944, telegram which read as follows:

"ASSOCIATED FRUIT DISTRIBUTORS
FIFTEEN CARS STORAGE U. S. ONE EMPERORS DECEMBER TENTH CONVERSION SATISFACTORY AT TWO DOLLARS AND FIFTY CENTS FOB EXETER GUARANTY BY BUYER. ONE THOUSAND DOLLARS DEPOSIT ON 10 CARS AND SEVEN HUNDRED FIFTY DOLLARS ON FIVE CARS SAID DEPOSIT TO BE PAID IMMEDIATELY ON INSPECTION AT SHIPPING POINT. YOU TO ARRANGE FOR STORAGE AS AGREED. BALANCE OF PACK INTEND TO LOAD AFTER OCT. TWENTIETH WILL BE GLAD TO MAKE DEAL ON SAME ABOUT THE 15TH OF OCT.
JOHN C. KAZANJIAN
150 PM
US FOB 10:15 KAZANJIAN"

(Tr. p. 454) (Underscoring is by appellee.)

Even a casual comparison of the two telegrams shows the rejection of the offer contained in the first telegram and new counter offers.

Crane's telegram provided that the deposit of $1,000.00 per car for ten cars and $750.00 per car for the first five cars was to be made "upon receipt USONE government inspections", which could only mean upon receipt of the government inspections by appellants in Texas. Mr. Bockstein, one of the partners of West Texas Produce Co., so testified (Tr. pp. 165-166). Kazanjian's telegram rejected this proposal and required that upon all fifteen cars "deposit to be paid immediately on inspection at shipping point". The shipping point was Exeter, California, not some place in Texas. This difference is apparent, Kazanjian wanted his deposit i.e. cash, in Exeter, California, immediately upon inspection. He did not want to mail an inspection to Texas and receive in exchange a check or draft which in turn would be payable in Texas. Crane testified that on all grapes purchased from Kazanjian during the period of ceiling prices immediate cash deposit was made (Tr. p. 241). The so-called Memorandum of Sale which appellants' broker Margules forwarded to Crane (Tr. pp. 26-27) actually specified that appellants would pay by drafts through specified Texas banks upon receipt of the inspection reports. Incidentally, no copy of this was forwarded to Kazanjian.

Crane's telegram provided "depending you handle through us balance of cars you mentioned for fresh shipment advise when expect ship these", i.e., he was

making a term of the offer the handling of the balance of Kazanjian's shipment. Kazanjian rejected this term by stating "balance of pack intended to load after October Twentieth will be glad to make deal on same about 15th of October."

Appellants by their pleadings and testimony claim to have purchased ten cars, yet the two telegrams refer to fifteen cars.

Under cross-examination by Mr. Hoppenstein, one of the attorneys for appellants, Kazanjian testified that he told Crane that "I wanted my payment in Exeter" because a tomato shipper next door to him went broke because the parties to whom the tomatoes were sold owed money when he got through (shipping) and "I wanted to be sure that I had my money right there in Exeter at the time while I still have physical possession of my grapes" (Tr. pp. 179-180). He further testified that Crane would give him the storage space if Kazanjian would tie in all the rest of his grapes and give them to Crane but that Kazanjian didn't want to commit himself to do so at the time (Tr. p. 180). Kazanjian testified that one other condition was that the inspections were to be taken in Exeter, at the place of packing, not out of storage or any other place (Tr. pp. 180-181), and that when he got Crane's wire not one of these three major things was clear and not one of the terms was satisfactory (Tr. p. 181).

There was not any acceptance of Crane's offer by Kazanjian. It was rejected and new terms proposed. These latter were never accepted.

Crane's wire provided "will forward confirmations for your signature soons received airmail from buyers". This added a contingent term which was never complied with even if Kazanjian had accepted Crane's offer instead of rejecting it. Crane never received the confirmation referred to from the buyers and never forwarded any confirmation to Kazanjian (Tr. p. 240).

IV. THE DISTRICT COURT CORRECTLY FOUND THAT CRANE INTENDED TO DESIGNATE A STANDARD CONFIRMATION FORM.

Appellants argue (Points III, IV, V, VI and VII of their Opening Brief) that the District Court's finding that Crane intended to designate the use of a standard confirmation form before a binding agreement was entered is against the weight of credible evidence. This argument again overlooks the fact that the District Court observed the various witnesses and under Rule 52 the Federal Rules of Civil Procedure and the authorities hereinbefore cited must be deemed to have adjudged those witnesses and evidence in support of its finding more credible than the witnesses and evidence against it.

As the points raised are actually immaterial because there was not any contract entered into by Kazanjian and to avoid repetition, only brief comment will be made upon these points and the argument of Crane upon these points is adopted by Kazanjian.

Appellants argue that there was no ambiguity in Crane's telegram of September 26, 1944 (Tr. pp. 26-

27). Appellants' discussion and efforts to explain the telegram indicate the presence of an ambiguity. However, even assuming this to be true, it is immaterial insofar as Kazanjian is concerned. He did not authorize Crane to send any telegram and did not know it was sent (R.T. p. 181). Naturally he is not bound by it. Kazanjian had not authorized Crane to make a sale for him. Appellants falsely assume that Crane could confirm a sale or enter into a contract for Kazanjian which Kazanjian had not authorized.

Appellants argue that the Court erred in permitting Crane to testify that the phrase "Subject to Confirmation" in his telegram of September 26, 1944, constituted a reference to confirmation by use of a particular form. The telegram went to thirteen different brokers and specifically provided that the offer was subject to confirmation. The Court admitted the testimony upon the ground it goes to the custom of the trade. While immaterial to Kazanjian for the reasons set forth, it appears that appellants' argument that there was no ambiguity in the telegram must fall because without the oral testimony it cannot be ascertained what the phrase meant or from whom the confirmation was to come i.e., the buyer, the seller, or both. However, as the Court found that Kazanjian was not a party to any contract, the introduction of this evidence would be immaterial or would not constitute reversible error.

Cascaden v. Bell, 257 F. 926, 930 (CCA 9);
Anglo California Nat. Bank v. Lazard, 106 F. 2d 693, 706 (CCA 9).

Appellants argue that even if Crane's telegram required the use of a standard confirmation of sale, as found by the Court (Tr. p. 77, par. V), his intention was undisclosed or would not bind appellants. This argument ignores the fact that Crane was the agent of appellants and was not acting for Kazanjian. The authorities cited are not relevant to the facts of the instant case.

Appellants state that there is no evidence in the record to support the District Court's conclusion that Crane's telegram to Margules required that any contract entered into should be confirmed by the parties to the proposed contract and in particular by Kazanjian. Oddly enough, this argument immediately follows the appellants' point that the trial Court erred in permitting Crane to testify that the use of the phrase "Subject to Confirmation" required the use of a standard confirmation of sale form. This in itself shows the necessity of a confirmation. Both oral testimony and the telegrams themselves showed the necessity for confirmation. However, insofar as Kazanjian is concerned this would again be immaterial. Crane was the agent of appellants not of Kazanjian. The latter by his telegram of October 4th prescribed terms never accepted by appellants and Kazanjian was never a party to a contract with appellants.

V. KAZANJIAN NEVER ACCEPTED TERMS PROPOSED BY MARGULES, CRANE OR APPELLANTS.

Conclusion No. 2 of the District Court (Tr. p. 82), is that Kazanjian never accepted the terms proposed by Margules. Appellants argue that Margules never made any proposal but accepted in behalf of appellants the offer of Kazanjian through Crane. No discussion of the facts is made by appellants although the burden is upon them to support their position. It again overlooks the fact that Kazanjian did not authorize Crane to act in his behalf and that Crane and Margules represented appellants and not Kazanjian. The record shows that the only act of Kazanjian, whether it be acceptance, rejection or a counter proposal, was contained in his telegram of October 4, 1944. It was a rejection of the offer of appellants in Crane's telegram of October 3, 1944, and contained new offers never accepted by anyone.

VI. THE TERMS CONTAINED IN KAZANJIAN'S TELEGRAM OF OCTOBER 4, 1944 WERE NEVER ACCEPTED BY APPELLANTS OR ANYONE ELSE.

Appellants argue that there is no evidence to support the District Court's finding (Tr. p. 82, par. 2) that neither Margules nor appellants accepted the terms proposed by Kazanjian to Crane in his October 4th telegram. The argument takes a peculiar trend. No effort is made to sustain the burden cast upon appellants to show that there was such an acceptance and the record, of course, is devoid of any such evi-

dence. On the contrary, appellants' argument under this point again claims that the October 4th wire of Kazanjian accepted the terms contained in Crane's October 3rd wire. Obviously the one first in date could not be an acceptance of the subsequent wire.

Appellants again argue that there is no substantial difference between the two telegrams. The differences between the two telegrams have been discussed heretofore. Crane's telegram provided for payment by draft upon receipt of inspection reports in Texas; Kazanjian rejected this and required payment in cash in California at the time of inspection. Crane's telegram required that Kazanjian give him the balance of Kazanjian's crop as a part of the deal; Kazanjian refused to do this.

Appellants state on page 42 of their brief that on cross-examination Kazanjian was requested to point out wherein his telegram of October 4th to Crane consisted of different terms (from Crane's telegram), and wherein he designated that the terms under which Crane had sold for Kazanjian's account were not satisfactory to Kazanjian but that the answer was not received because the Court sustained an objection upon the ground the question was argumentative (Tr. p. 186). The objection was properly sustained not only because it was argumentative but also because it assumed something that the Court found was not a fact, i.e., that Crane had sold grapes for Kazanjian's account. As a matter of fact appellants were permitted to examine Kazanjian in detail regarding the

differences between the two telegrams (Tr. pp. 176 to 186, 342 to 345). His testimony outlined clearly the differences that appellants now attempt to forget.

VII. THE STATUTE OF FRAUDS.

Appellants argue that the California statute of frauds is procedural only and is not a bar to an action brought under the Perishable Agricultural Commodities Act. It cites as authority the case of *Rothenberg v. H. Rothstein and Sons,* 183 F. 2d 524 (CCA 3). We have found no Federal cases contrary to the cited case although the Secretary of Agriculture recognized the statute of frauds as being an integral part of the applicable law in this case (Tr. pp. 54-55). However, the point is totally immaterial since it is established by the amply supported findings of the Court that Kazanjian was not a party to any contract and had not authorized Crane to act for him.

Incidentally, in passing, appellants' Point X pertains to the contention that the California statute of frauds is concerned only with the party to be charged, i.e., the defendant in the proceeding. Inasmuch as Kazanjian is one of the defendants and one of the parties to be charged here, it is assumed that appellants contend that Kazanjian did sign a writing and can be charged but since he signed only the October 4th telegram which even appellants do not seriously claim was accepted by them, the relevancy of the authorities cited is not apparent.

The complete answer to this, and many other of appellants' contentions, is that Kazanjian was not a party to any contract.

VIII. APPELLANTS' CONTENTION THAT THE DISTRICT COURT ERRED IN FINDING THAT CRANE MADE NO FALSE REPRESENTATIONS.

This contention applies only to the defense of Crane and not any answer need be made in behalf of Kazanjian.

IX. EFFECT OF EMERGENCY PRICE CONTROL ACT UPON THE CONTRACT.

The District Court judge found that the maximum ceiling price for grapes had been exceeded by the agreement of appellants to pay $50.00 per car procurement commission to Crane plus 3½¢ per lug to Southwest Brokerage Company for procurement services (Tr. pp. 80-81, par. IX). As stated in the memorandum opinion, the District Court judge declared that he did not think such finding was necessary for his decision but that if he is reversed by the higher courts he would then hold the contract was in violation of the price regulations. For the reasons heretofore stated there was not any contract in this case which was binding upon the parties hereto and any finding upon the effect of the Emergency Price Control Act was unnecessary. This Court has heretofore decided in *Joseph Denunzio Fruit Company v. Crane,*

188 F. 2d 569, that if a contract similar to that here involved was actually entered into, there was not any violation of the Price Control Act. This case is now pending before the Supreme Court of the United States on a petition for writ of certiorari. As the point is entirely immaterial in the present case because there was in fact not any contract between the parties and in view of the extended arguments which have heretofore been made before this Court, it is deemed unnecessary to reargue the point further.

X. ASSUMING THAT THERE WAS A CONTRACT AND A BREACH AND REPUDIATION OF THE CONTRACT, THE APPELLANTS ACQUIESCED THERETO AND THE MEASURE OF DAMAGES WOULD BE ESTABLISHED BY THE VALUE OF GRAPES UPON THE DATE OF ACQUIESCENCE.

The District Court found that on October 24, 1944, appellants commenced to purchase grapes to replace those which they contended they had purchased from appellees (Tr. p. 79, par. VII), and that on October 10, 1944, and up to and including November 15, 1944, the reasonable market value of U. S. No. 1 Emperor Grapes in carload lots at or in the vicinity of Exeter, California, was $3.25 per lug (Tr. p. 79, par. VIII). The Court also concluded that assuming there was a binding agreement to buy and sell grapes, the appellants acquiesced in the repudiation of the agreement on October 24, 1944, by contracting to purchase, or purchasing grapes, to replace the grapes covered by the agreement and that the measure of

damages would arise as of October 24, 1944 (Tr. p. 82, par. 4).

Appellants contend that the measure of damages would be established as of December 10, 1944, and not on the date that they so acquiesced.

While the point is immaterial because there was not any contract for Kazanjian to breach and there is not any liability on his part, a brief comment will be made.

There is no attack made upon the sufficiency of the evidence to support the Court's findings. They are amply supported and in the absence of attack there appears no necessity for detailing the evidence upon which they were based.

As indicated by this Court in *Compania Engraw v. Schenley Distillers Corp.,* 181 F. 2d 876, the measure of damages would be fixed as of the date of actual acquiescence in the repudiation of a contract.

In the present case, even had the agreement which appellants claim existed actually existed, appellants knew of the breach and repudiation of any obligation to deliver grapes and acquiesced thereto by actual purchases of grapes replacing a part of those they claim to have purchased. Grapes were available at $3.25 per lug, the price found by the Court to be the reasonable value during an extended period to November 15, 1944. Appellants had a duty to minimize their loss. They cannot now say that while they knew of the repudiation of contract and acquiesced thereto

and even replaced a part of the grapes as of the date of acquiescence they can later claim the measure of damages is to be based upon some date after the date of acquiescence.

CONCLUSION.

The findings of the District Court which are attacked by appellants are supported by ample and credible evidence. The appellants have not sustained the burden of showing that such findings are clearly erroneous and the findings should be sustained.

Kazanjian at no time entered or authorized or ratified any contract upon which he defaulted or can be held responsible.

The judgment of the District Court should be affirmed.

Dated, Fresno, California,
August 31, 1951.

Respectfully submitted,
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